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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted [redacted]

File: WAC 01 063 52654 Office: CALIFORNIA SERVICE CENTER Date: FEB 06 2003

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of California in June of 2000. It is engaged in operating a retail shop. It seeks to employ the beneficiary as its chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established a qualifying relationship between itself and a foreign entity. The director also determined that the petitioner had not established that it had been doing business for the requisite one year prior to filing the petition. The director further determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service failed to exercise its discretion in reviewing the record in its entirety, failed to adjudicate the case on its merits, and rendered an arbitrary decision marred with adverse and unsubstantiated inferences.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement

from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue to be examined is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer in this case.

8 C.F.R. 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or

proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner submitted documentation indicating that the overseas entity was organized in March of 1984 as a proprietary organization in South Africa. The organization subsequently amended its status to that of a closed corporation with two members each holding a fifty percent interest. The overseas entity amended its status on October 31, 2000 to a company having share capital. Fifty-one shares were issued to the beneficiary and forty-nine shares were issued to another individual. The beneficiary on November 1, 2000 transferred her fifty-one shares to the petitioner for a consideration of one South African rand. The petitioner was organized in June of 2000, several months prior to the transfer of shares from the beneficiary.

The director erroneously determined that since the foreign entity was established before the petitioner, the foreign entity could not be a subsidiary of the petitioner. Counsel correctly points out that the establishment of the foreign entity prior to the establishment of the petitioner is not relevant when determining a parent/subsidiary relationship. The petitioner has submitted adequate documentation to demonstrate that the petitioner owned and controlled fifty-one percent of the overseas entity at the time the petition was filed. The director's decision will be withdrawn as it relates to the issue of qualifying relationship.

The second issue to be examined is whether the petitioner has been doing business in a regular, systematic, and continuous manner one full year prior to filing the petition.

8 C.F.R. 204.5(j)(2) states in pertinent part:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The director's review of the record disclosed that the petitioner had purchased a pre-existing business in August of 2000 and had

filed the petition on December 18, 2000. The director determined based on this information that the petitioner had not been doing business for at least one year at the time of filing the petition.

On appeal, counsel for the petitioner asserts that when the petitioner acquired an existing business in August of 2000, it became the "*successor in interest* to the ongoing viable and profitable business that had been doing business (the regular, systematic and continuous provision of goods and/or services) **for a period of eight (8) years.**" Counsel asserts that it has always been the Service's practice to recognize the purchase of an existing United States business by a United States petitioner for the fulfillment of the one-year doing business requirement. Counsel asserts that the purpose of the one-year doing business requirement is to examine the United States petitioner's viability to support a permanent job offer. Counsel asserts that the Service has sufficient grounds to approve this case, as the petitioner which is carrying on the business of its predecessor in interest and is at the same location, is viable and is able to support a permanent job offer to the beneficiary.

Counsel's assertions are not persuasive. Counsel has not submitted any case law, policy memoranda, or other evidence to support the assertion that the Service has always recognized the purchase of an existing business as sufficient to satisfy the requirement of a newly established petitioner doing business for one year. Moreover when examining the regulatory requirement at 8 C.F.R. 204.5(j)(3)(i)(D), the requirement clearly sets forth that the prospective United States employer must have been doing business for one year. Although we recognize that the petitioner has assumed the existing business's duties, rights, obligations, liabilities, assets, good will, and is located in the same place as the pre-existing business we decline to speculate that the petitioner will enjoy the same or similar viability as the pre-existing business for immigration purposes. The petitioner has not satisfied the requirement that it (not a previously existing business owned and managed by unrelated parties) has been doing business for one year prior to filing the petition.

The third issue to be examined in this proceeding is the nature of the beneficiary's employment with the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other

supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

The petitioner in its letter supporting the petition provided the

following description of the beneficiary's duties and responsibilities:

> Her duties and responsibilities continue to be fully executive in nature. [The beneficiary] utilizes her executive and managerial skills in conjunction with her substantial professional experience to direct the day-to-day management of the corporation and to ensure that all systems are implemented in accordance with company procedures and policies that she sets as its top executive. She is responsible for directing the overall administration of the business, ensuring the maintenance of all financial records and supervision of the management personnel (i.e. Retail & Procurement Manager, Administrative Manager) as well as other corporate personnel (i.e. Merchandising Coordinator) and independent contractors (i.e. Certified Public Accountant, Retail/Sales Analyst, & Corporate/Business Attorney). She directs the management of the corporation, establishes corporate goals and policies, enters into contracts and negotiations on behalf of the company, and exercises her discretionary authority in making corporate decisions, and firing staff. She will also continue to attend various prominent national executive retail conferences and expositions as the executive representative of the U.S. entity, and is responsible for making all binding legal decisions regarding the business operations of Kidniki.

The petitioner also provided its organizational chart depicting the beneficiary as the chief executive officer, a retail and procurement manager, an administrative manager, a merchandising coordinator and head of retail personnel, and two retail personnel. The chart also depicted an attorney, a certified public accountant, a retail/sales analyst, and independent contractors under the beneficiary's supervision.

In denying the petition, the director determined the evidence reflected that the beneficiary was supervising four non-professional employees. The director noted that the petitioner referred to two of the employees as managers but determined from the record that the managers were not managing other employees or a function. The director concluded that it was reasonable to believe that the beneficiary would be involved with the day-to-day non-supervisory duties of operating the business.

On appeal, counsel for the petitioner submits two letters from the beneficiary's accountants stating that the beneficiary had been the chief executive officer for both the petitioner and the overseas entity. Counsel also asserts that the retail and procurement manager, the administrative manager and the merchandising coordinator/head of retail personnel are senior-level professionals having authoritative discretion over the day-

to-day functions of their departments. Counsel references the *Occupational Outlook Handbook* published by the Bureau of Labor Statistics to indicate that the purchasing/procurement manager and the administrative manager hold specialized and professional occupations. Counsel also asserts that the beneficiary will not be involved in the day-to-day non-supervisory duties of operating the business but rather the two managers will manage their departments. Counsel further asserts that the two managerial employees and other staff will allow the beneficiary to focus on executive responsibilities. Counsel finally asserts that the Service unlawfully considered the small size of the company when making its determination.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). Assertions by outside parties that the beneficiary performs in her position as an executive are not sufficient for immigration purposes. The petitioner's job description provides that the beneficiary will direct the day-to-day management of the corporation, direct the management of the corporation, establish corporate goals and policies, ensure implementation of the policies and procedures, direct the overall administration of the business, and exercise her discretionary authority in making corporate decisions. The description adds that the beneficiary will supervise management personnel and fire staff. These statements merely paraphrase the statutory definition of executive and managerial capacity. See section 101(a)(44)(B)(i), (ii), (iii) and section 101(a)(44)(A)(ii) and (iii). The job description also provides that the beneficiary will ensure the maintenance of financial records, enter into contracts and negotiations on behalf of the company, attend conferences, and make binding legal decisions regarding the business operations of the company. It is not possible to determine from this description whether the beneficiary will be performing managerial or executive duties with respect to these duties or will be actually performing the duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner's job description for the beneficiary's position does not sufficiently convey an understanding of what the beneficiary will be doing on a day-to-day basis.

The petitioner does not provide job descriptions for the employees subordinate to the beneficiary. The petitioner and counsel appear to rely on the job titles for the different subordinate positions to establish that the positions are professional or managerial in nature. However, a job title and its accompanying definition in the *Occupational Outlook Handbook* are not sufficient to describe the actual day-to-day activities of the subordinate employees. The petitioner's hierarchical structure found on the organizational

chart also does not correspond to the petitioner's statement that the beneficiary supervises the retail/procurement manager, administrative manager, and merchandising coordinator. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are general and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

It does not appear that the director based her decision on the size of the company as counsel asserts. Rather, the director in considering the entirety of the record and its deficiencies found that the petitioner had not provided sufficient evidence of the beneficiary's capacity as an executive or manager. However to further reiterate, the petitioner has not provided adequate supporting evidence of the job duties of the beneficiary's subordinate employees. The petitioner has not provided evidence that independent contractors were hired on a continuous and full-time basis. Based on the petitioner's lack of information regarding the beneficiary's subordinate employees and contractors, as well as the lack of a comprehensive description of the beneficiary's daily duties, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Beyond the decision of the director, the petitioner has not provided sufficient evidence to establish that the beneficiary was employed in an executive or managerial capacity for the foreign entity for one-year in the three years prior to her entry into the United States as a non-immigrant. The record also does not contain sufficient evidence to establish that the petitioner has the ability to pay the beneficiary the proffered wage of $40,000 per year. As the petition will be dismissed for the reasons stated above, these issues are not examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.